

## **REMARKS**

### ***Introduction***

Claims 27 and 29 are pending in the instant application. The Examiner is respectfully requested to reconsider the rejection in view of the comments made below.

### ***Claim Rejections – 35 USC § 103***

**Claim 27 is rejected under 35 USC § 103(a) as being unpatentable over McNair (US D233,703) in view of York (US 6,241,696) and Ferrier (US 2,806,470).**

Applicant respectfully disagrees that pending claim 27 is obvious based on the combination of McNair in view of York and Ferrier.

McNair, a design patent, is directed to a hand held electric massager. Figures 2 and 3 of McNair illustrate an orb-like arch of the tool that is particularly rounded. Applicant respectfully disagree that McNair's arch is "gradually arched yet sufficiently flattened . . . to allow maximum contact" with the body. Due to its rounded, orb-like construction, only a small percentage of the uppermost portion of the McNair tool can be applied to the body receiving a massage at one time: either directly in a downward motion or side to side in a rocking/swinging motion. In contradiction to the claimed invention, the McNair tool is not designed for, nor can it function as, as a device for maximum contact with the body when using the device for a massage.

The massaging device of the claimed invention is designed for effleurage, petrissage, frictions and tapotment movements (all the main moves of Swedish massage) when held by the user. In massage therapy: the effleurage movement is carried out by a masseur/masseuse with a flat palm(s), in a slow, sweeping movement that usually involves firm pressure; a petrissage movement is where a masseur/masseuse is kneading muscle against muscle or muscle against bone; friction movements is where a masseur/masseuse applies either or light or deep pressure (depending on personal necessity/taste) to the skin in tight circles or sawing motions (moving the tool back and forth and which can be done in small focused movements or larger, sweeping strokes); tapotment movement is carried out by the masseur/masseuse who applies light percussive movements onto a focussed area of the skin and pressure point therapy is where a masseur/masseuse applies static

pressure (either small and focused or more flat and general) onto a specific area for short periods of time (usually 3-5 seconds). The upper arch, in particular, of the claimed device can be used for all these movements for stroking movements (effleurage), rocking or kneading movements (pestrissage), sawing motions (frictions), percussive motions (tapotment) and static movements (pressure point therapy). Furthermore, the device is multifunctional in that it can be used in any position: the upper arch (1) can achieve effleurage, (rocking) petrissage, frictions, tapotment, static pressure; while the side portions (3) can achieve kneading petrissage, frictions and pressure points; and the lower arch (4) can achieve effleurage, (rocking) petrissage and frictions. For example, with regard to the upper portion of the tool (1) in particular, all of the maneuvers mentioned above can be achieved either utilizing the finger holes or not. Effleurage, pestrissage movements and sweeping friction movements can be achieved by the upper arch in two distinct positions: (a) with the uppermost (or outer edge of the) portion of the upper arch (1) being pressed onto the skin or (b) with the side of the uppermost portion (1) being pressed onto the skin. In option (a), the user can achieve this movement by either utilizing the finger holes (straight fingers can be inserted into the holes with the palm facing downward or one can place the palm (in a downward position) onto the uppermost edge of the lower portion (4) and insert the fingers into the holes in a backward, fist-like motion so that the whole lower portion of the tool is gripped within the fist or they can choose to not use the finger holes at all and instead apply the tool by gripping the whole lower portion (4) between the fingers and the palm, either with one or both hands. In option (b), the device can be used by turning it flat, on its side, with the upper portion (1) leaning into the palm and the fingers resting over the lower arch (4) with the user gently gripping the outer rim of the lower portion for control. Both options allow the user to carry out effleurage and sweeping frictions quite easily, whilst option (a) allows effective static pressure or (rocking) petrissage and option (b) easily facilitates focused kneading petrissage by leaning the hand either to the left or right to avail of the side portions (3) without using the finger holes. Once again, the user can avail of every part of the device and with a wide variety of hand positions that both include and omit the finger holes. None of the cited massage prior art devices have this capability. Instead, the cited devices can only be used for one basic move in one hand position.

The McNair device cannot provide a massage that includes either effleurage or petrissage movement. The roundness on all sides of its center-point of the orb would make it difficult to grip the skin of the body receiving the massage: the center-uppermost point of the orb would be depressed onto the skin but the sides of the orb would graduate away, making the slightest movement or application of pressure of any kind to cause the user's grip on the skin to slip away.

In contrast, as claimed, the unitary arched dome member of the claimed invention is gradually arched yet sufficiently flattened so as to permit maximum contact with the body receiving a massage from the device. The gradual arch with flattened area provides the necessary surface area required for fluidity of movement and effectiveness to maintain comfort to the body receiving the massage and the user can apply all of its uppermost surface to the recipient's skin in an effective and controlled movement (i.e. no slipping or lack of traction/grip on the recipient's skin), allowing sweeping effective effleurage and more intense petrissage movements. The McNair device cannot accomplish a full range of massage movements, whereas the claimed invention overcomes these deficiencies.

To overcome the deficiencies of McNair, York is cited as having an arched dome member with a longer length than the hand grip and having a generally isosceles trapezoid shape overall. Applicant respectfully disagrees. First, there is no reason why one of ordinary skill in the art would modify the electrical device of McNair with features of York. York is a manual hand held massage implement with a circular, rotating balls that contact the body receiving the massage. The working premise on using the rotating balls in York is that the user can roll the balls up and down or from side to side on a given area to produce a 'massage effect.' With the York device, contact with the recipient's skin is specifically limited to the top point of each ball, i.e., the upper-most point of the orb as it rolls across the skin, which results only in a mere quasi-effleurage movement that is limited in both scope and depth. Because the York device is so widely-arched, only two balls will ever be touching the recipient's skin if applied directly (in a downward motion or a rocking movement (i.e. from side to side in a swinging motion). The York device lessens the functionality and effectiveness of the effleurage movement.

Ferrier is cited for its showing of finger holes in a massage apparatus. The Ferrier massage apparatus is designed to envelope a body part, such as a leg, with an elastic diaphragm and applying compression with both hands holding onto the apparatus. Figure 3 of Ferrier shows this massage apparatus in use over a person's leg. Ferrier's apparatus has multiple finger holes for the fingers of both hands, including the thumbs. While the Ferrier apparatus shows finger holes, there is no reason why one of ordinary skill in the art would look to the Ferrier device to modify McNair or York.

Applicant submits that there is not a motivation in McNair or York to modify the devices as noted in those patents. McNair's massage device is an electrical massager. York's massage device uses rotating balls as a massager. There is nothing in either patent to motivate a person of ordinary skill in the art to make modifications as indicated by the Examiner. The determination of obviousness is not whether a person could, with full knowledge of the claimed device, reproduce it from prior art or known principles. The question is whether it would have been obvious, without knowledge of the inventor's achievement, to produce the same thing that the patentee produced. This judgment must be made without the benefit of hindsight. It is improper to take concepts from other devices and change them in light of the now-known template of the claimed device, without some direction in the prior art that would render it obvious to do so. The fact that the prior art are "hand manipulated massages" is not a motivation to change the essential features of these prior art devices into the claimed device.

For these reasons, the Examiner is requested to withdraw this rejection.

**Claim 29 is rejected under 35 USC 103(a) as being unpatentable over McNair (US D233,703) in view of York (US 6,241,696), Ferrier (US 2,806,470) and Back (US D408,543).**

Applicant respectfully disagrees that pending claim 29 is obvious based on the combination of McNair in view of York, Ferrier and Back. The combination of McNair, York and Ferrier are discussed above and are distinguishable from claim 29 for the same reasons as for claim 27. Claim 29 includes the feature that the bottom portion of the hand grip is concave. Back, a design patent, is cited by the Examiner for showing a hand-held massager with a concave hand grip. Applicant respectfully disagrees. As seen in Figure 1 of Back, the hand grip would be called a "pistol grip"

with a notch that orients the hand in a vertical orientation. While there is a concave portion in the pistol grip of Back's massager, one of skill in the art would not look to Back, nor substitute its pistol grip hand grip. The McNair tool was designed solely as an electric massager, i.e., the vibrations produced by the electronic element of the tool would provide a superficial vibrational massage. The large, uppermost portion of the tool as shown in Figures 1, 2 and 3 of McNair was designed to house the electrical element. The orb-like roundness is not suitable for the main and varied movements of effleurage or petrissage in a massage as is the design, and as claimed, in the instant invention. A variation on the handgrip would not remedy the design limitation of McNair. Applicant respectfully submits that the claimed device cannot be used as a blueprint to pick and choose elements among the prior art without a reason or motivation to make these changes.

***Conclusion***

In view of the distinguishing comments on the cited references, Applicant believes the pending application is in condition for allowance. Accordingly, Applicant respectfully requests that the Examiner issue a Notice of Allowance.

Applicant herewith submits the fee of \$245.00 for the two-month Extension of Time.

Applicant believes no other fee is due with this response. However, if a fee is due, please charge our Deposit Account No. 08-0219, under Order No. 2204884.00120US1 from which the undersigned is authorized to draw.

Respectfully submitted,

Dated: June 27, 2010

/Hollie L. Baker/  
Hollie L. Baker  
Registration No.: 31,321  
Attorney for Applicant

Wilmer Cutler Pickering Hale and Dorr LLP  
60 State Street  
Boston, Massachusetts 02109  
(617) 526-6000 (telephone)  
(617) 526-5000 (facsimile)